BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A
JUDGE, NO. 01-244
CHARLES W. COPE **CASE NO.: SC01-2670**
_____/

MOTION TO DISMISS COUNT III, FOR DISCOVERY AND FOR HEARING ON THE GROUNDS OF SELECTIVE PROSECUTION AND VINDICTIVE PROSECUTION

COMES NOW the Respondent the Honorable Charles W. Cope and moves this Court to dismiss Count III in this case on the grounds that the Judicial Qualifications Commission is selectively prosecuting and vindictively prosecuting the Respondent on such charge in violation of the equal protection and due process clauses of the First and Sixth Amendments of the United States Constitution and the equal protection and due process clauses in Article I, Sections 4 and 5 of the Florida Constitution, and federal and state constitutional guarantees of the right to privacy. Respondent also moves this Court for discovery relevant to this motion and for a hearing.

SUMMARY

1. In the early morning hours of April 4, 2001, Judge Cope's company was solicited by a 32 year old woman (the "Woman") who volunteered to Judge Cope that she had a married boyfriend, had obtained a recent abortion, and had been discussing these matters with her alcoholic and abusive mother. She told Judge Cope she wanted to get away from the mother. Both Judge Cope and the Woman were intoxicated.

2. Judge Cope invited the Woman to walk on the beach with him and she accepted. The two walked down to the beach at approximately 1:30 a.m. on April 4, 2001. While on the beach the two held hands and generally discussed the matters that the Woman had earlier confided. Ultimately, the two removed their shoes and waded and danced in the surf and exchanged several kisses. The beach at all times was deserted.

3. The Woman advised Judge Cope that she did not want to return to her mother's room and accompanied him back to his hotel room. There the two engaged in brief intimate conduct consisting of kissing and petting. The Woman partially disrobed and Judge Cope observed details of her intimate apparel and anatomy which he could not have otherwise known about but for observing same. Eventually the Woman advised that she did not want to go further with the physical encounter as she feared becoming pregnant again. The intimate conduct immediately stopped, the Woman got dressed and returned to her own hotel.

4. The following night in the early morning hours of April 5, 2001, the Woman placed Judge Cope under citizen's arrest for "prowling." The police under California law had no discretion in this matter and they accordingly took Judge Cope into custody and booked him. Judge Cope waived *Miranda* and volunteered to the police the events of the preceding evening as described above. The police confronted the Woman with Judge Cope's rendition and she invented an allegation that Judge Cope had made "several forceful sexual advances, kissed her, touched her breasts

(plural), and inserted his tongue in her mouth" – all on the beach. She further falsely asserted that she ran from Judge Cope on the beach back to her hotel room where she pounded loudly on the door for her mother to let her in to the room.

5. The following morning the woman was interviewed by the police in the presence of her mother. At that time, according to the mother, she embellished her complaint about Judge Cope's conduct by asserting that Judge Cope "attempted to rape" her on the beach.

6. The Deputy District Attorney in California charged Judge Cope with "prowling," and "peering into an occupied dwelling" in connection with alleged events occurring on the morning on April 5, 2001, which are more particularly set forth and discussed in the accompanying motion to dismiss Counts II, IV, V and the majority of Count I.

7. Apparently the District Attorney did not place any credence in the Woman's report of an "attempted rape" and the several "forceful sexual advances" on the beach.

8. On June 15, 2001, the Woman gave a tape recorded statement to the investigator for the District Attorney's Office. In that statement, attached as Exhibit 1, the Woman totally recanted her earlier allegations. Notwithstanding that fact, when Judge Cope later refused to plead no contest to a single charge of prowling, the District Attorney in retaliation charged Judge Cope with "battery" of the Woman on the beach.

9. Judge Cope appeared through counsel before the Judicial Qualifications Commission Investigative Panel on October 22, 2001. The Panel was advised, *inter alia*, that the "battery" charged in California never occurred. The Panel was further advised that the Woman's initial allegations of predatory conduct were totally recanted in June 2001. The Panel was further provided a report of polygraph examination exonerating Judge Cope of all of the charges in California, including the battery charge. The Panel was further advised that Judge Cope passed the polygraph on the proposition that the Woman voluntarily accompanied him back to his hotel room where brief and limited intimate conduct occurred.

10. Judge Cope had earlier reported the events in California to Judge Susan Schaeffer; and Judge Schaeffer had by correspondence to the Investigative Panel relayed Judge Cope's statements to her. These earlier statements likewise confirmed the scenario described by Judge Cope with the Woman. Notwithstanding, the Panel refused to investigate the allegations, did not consider the Woman's impossibly inconsistent claims, and charged Judge Cope in Count III of the formal notice of charges with "Inappropriate Conduct of an Intimate Nature."

11. The four paragraph charge of Count III states in pertinent part:

> Paragraph 13: You subsequently engaged or attempted to engage in conduct of an intimate nature with the daughter, who was obviously intoxicated and in an emotionally vulnerable state.
>
> Paragraph 14: Regardless of whether the daughter initiated the intimate conduct or actively resisted sexual advances by you, your conduct tends to undermine the public's confidence in the judiciary and the means of the judicial office.

> Paragraph 15: The inappropriate nature of your conduct was exacerbated by your intoxicated state, the fact that your conduct occurred while attending an out of state judicial conference at taxpayers expense, and the public location of much of your conduct.

It is clear that such allegations were drafted so as to make the Count impossibly nuanced, scurrilous and virtually indefensible by Judge Cope.[1]

12. On December 13, 2001, only a week after the charge was filed, Special Counsel engaged in an hour long telephone conference with counsel for Judge Cope. At that time Special Counsel was advised that the only conduct on the beach between Judge Cope and the Woman was mutual kissing. Special Counsel was further advised that the Woman had lied to police, had later recanted her story, and most recently contended that Judge Cope never even kissed her on the beach. Finally, Special Counsel was advised that the Woman voluntarily accompanied Judge Cope to his hotel room where they engaged in brief intimate conduct well short of sexual intercourse and such conduct by the Woman was totally voluntary.

---

[1] This fact is further evidenced by Special Counsel's non-responsive and evasive purported answer to Judge Cope's interrogatories seeking the factual basis for such scurrilous allegations:

> *"13. Identify with particularity the term "emotional vulnerable state" as used in paragraph 13 of Count III in the Amended Notice of Formal Proceedings; describe with particularity the evidence supporting the allegation that the daughter was in an "emotional vulnerable state," and describe with particularity the manner in which alleged state was connected to or facilitated the Respondent's conduct.*
>
> The Special Counsel objects to this interrogatory as over broad and an improper "contention interrogatory." Subject to this objection , [the Woman] was visibly intoxicated and emotionally upset regarding several personal matters she discussed with her mother and with Respondent. But for this state, [the Woman] would not have gone anywhere with Respondent or had anything to do with him."

13. Special Counsel stated that it was not the business or interest of the JQC to intrude into Judge Cope's bedroom (hotel room) and that the JQC was concerned solely with the conduct on the beach. Special Counsel was advised that in the privacy of the hotel room Judge Cope had observed intimate details concerning the Woman's apparel and a physical anomaly which he could not have observed or known about other than for the fact that the encounter occurred. Further that independent verification of such details should satisfy Special Counsel that the Woman was lying. In response Special Counsel stated that if the facts were as represented to him the appropriate disposition of the entire case should be a public reprimand and alcohol aftercare.

14. Thereafter at great expense and effort, Judge Cope conducted depositions through his counsel and interviews of material witnesses in five states. That investigation established the following undisputed facts.[2]

15. The Woman voluntarily accompanied Judge Cope to the beach at approximately 1:30 a.m. on the early morning of April 4, 2001. The beach was a public place but was deserted. While on the beach for approximately an hour the two walked, held hands, talked about the Woman's personal issues in her life, waded in the surf, and eventually consensually kissed on the beach. No one witnessed this conduct. The Woman accompanied Judge Cope back to the privacy of his hotel room where she partially disrobed and the two engaged in petting which did not progress to

[2] Special Counsel has admitted that Judge Cope's version of the events is true.

any form of sexual intercourse. During this activity the Woman decided that she did not wish to go further for fear of getting pregnant again, the two mutually ceased the activity and the Woman got dressed, left and returned to her own hotel.

16. The only issue in dispute of a factual nature is whether the adult daughter's conduct was consensual. The evidence developed conclusively establishes that it was.

17. It is undisputed that the Woman initially made a false report to police concerning the events which are the subject of Count III. These events supposedly occurred in the early morning hours on a deserted public beach on April 4, 2001. It is undisputed that the Woman made no complaint of any misconduct by Judge Cope concerning those events until after she had arrested him in the early morning hours of April 5, 2001. It is further undisputed that she made no complaint about Judge Cope's conduct until after she learned from police that Judge Cope truthfully reported that she returned with him to his hotel room. Upon learning of Judge Cope's report, she falsely accused Judge Cope of making "several forceful sexual advances, touching her breasts, kissing her and inserting his tongue in her mouth" - - all on the beach. She further falsely reported that she ran in terror from Judge Cope on the beach and fled back to her hotel room where she pounded on the door to be admitted by her mother. While the Woman falsely denied at deposition making this report, Officer Nash confirmed under oath that the Woman did in fact make such a report. The Mother

even testified that she was present and heard the Woman tell Officer Nash that Judge Cope "attempted to rape" her on the beach.

18. In a tape recorded statement given June 15, 2001, to the investigator for the District Attorney's Office, the Woman totally repudiated her earlier allegations. At deposition on March 1, 2002, the Woman testified under oath that Judge Cope was very "gentle" on the beach, made no aggressive sexual advances, never conducted himself in an aggressive or insolent manner, and never even kissed her. "We certainly didn't have any intimate kiss. That I can guarantee you" (Transcript, p. 102). She continued to maintain however that she fled in terror from the beach and was let into the room by her mother.

19. The Mother testified under oath, contrary to the Woman's claim, that the Woman did not awaken her to be let into the room; but that upon awakening the next morning she found the Woman asleep beside her in the bed. She further denied the Woman's claim that she told the Mother during the night that Judge Cope "would have raped [her] if [she] let him."

20. Judge Cope testified that upon returning to his hotel room with the Woman, the Woman was no longer "very intoxicated" as alleged in the Count. (See Cope Depo p. 556)[3] More importantly, the Woman has confirmed this fact through

[3] Judge Cope testified that the Woman was intoxicated only at "one point of the night" at issue. He would have further testified if asked and will testify in the proceedings consistent with the Woman's testimony that she had sobered up prior to entering the hotel room.

her own testimony under oath in which she repeatedly acknowledged that she was starting to "sober up" before she even left the beach.

21. Judge Cope has further testified that the Woman was not at all upset when they left the beach together. (Cope Depo p. 292) To the contrary she was in a good mood and "positive." There is no credible evidence to the contrary. The Woman expressly admitted under oath that at no time did Judge Cope "take advantage" of her. In addition, the only credible evidence concerning the event is the testimony of Judge Cope (since the Woman denies the event even occurred) and that testimony establishes without contradiction that the conduct of the Woman was fully consensual at all times to the point where she elected to stop herself. (Cope Depo p. 327) Therefore there is no basis in the evidence, that the Woman's will was in any fashion overborne by Judge Cope's conduct or that Judge Cope attempted to overbear the Woman's will.

22. In addition to all the above, extensive investigation has established without contradiction that at the time of her encounter with Judge Cope in Carmel in April 2001, and before, the Woman was an unmarried adult female who had aggressively pursued a casual sexual lifestyle. She had solicited two immediately succeeding relationships with known married men, the latest being a student of hers much younger in years. The uncontradicted evidence establishes that during the relationship with her student, which both preceded and followed her encounter with

Judge Cope, she repeatedly, according to the affidavit of this individual, consumed alcohol and plied him with alcohol to facilitate sexual intercourse.

23. Concerning the alleged "emotionally vulnerable state" of the Woman, there is no competent evidence whatsoever establishing that the Woman's will or faculty of choice was compromised, let alone intentionally overborne by Judge Cope. Rather the evidence establishes that:

(a) The Woman affirmatively approached Judge Cope and initiated the process of intimacy. After the initial separation from Judge Cope and solitary contact with her mother in the confines of their own room, she voluntarily left her room and her mother to be with Judge Cope;

(b) The Woman had consumed no alcohol for at least two hours prior to voluntarily accompanying Judge Cope to his hotel room and voluntarily entering such room;

(c) The Woman suggested her desire to be alone with Judge Cope and away from her Mother. In the hotel room she voluntarily removed some of her clothing. No threats or force of any kind was employed by Judge Cope; and

(d) The Woman did in fact exercise her own free will and faculty of choice by deciding voluntarily to cease the brief intimate contact.

24. Further concerning the Woman's emotional state prior to her private intimate encounter with Judge Cope, the evidence clearly establishes through the Woman's own admission in deposition that Judge Cope never took advantage or her.

25. Accordingly, the evidence clearly and convincingly establishes that the Woman was not in any "vulnerable state" which permitted or caused her to engage in conduct that was not of her own choosing. It is further proven that such consensual intimate conduct between the Woman and Judge Cope (two consenting adults), transpired in the privacy of a hotel room and not in a public place. Furthermore, such conduct was not witnessed by anyone. Nor was such in violation of any law or Judicial Canon of Ethics or the Constitution of the State of Florida.

26. In addition to the above, the mother testified that the morning following the alleged assault on the beach, the Woman was in a very good mood and the two happily went sightseeing for the balance of that day. This is further conclusive evidence that the Woman not only was not attacked on the beach but did not have her will overborne or suffer any emotional damage from her brief consensual conduct in Judge Cope's hotel room.

27. As discussed at length in Judge Cope's accompanying motion to dismiss on the remainder of the counts, which is incorporated by reference, Count III was brought without any investigation and without probable cause. It was further brought in response to pre-charge publicity in which the integrity of the JQC was attacked for coddling judges, including Judge Cope.

28. After admitting that the evidence could not sustain the majority of Count I, and all of Counts II, IV and V, Tom MacDonald and Special Counsel sought to compel a plea to Count III which would have required Judge Cope to falsely admit

that he took advantage of the Woman in the hotel room because of her supposed "obvious intoxication" and "emotionally vulnerable state."

29. The Woman herself testified repeatedly at deposition that she was "sobering up" by the time she left the beach. It is also undisputed that she had consumed no alcohol for at least two hours prior to going to Judge Cope's hotel room. Furthermore there is no evidence in the record whatsoever that her faculty of choice was impaired in Judge Cope's hotel room. In fact the only evidence concerning the hotel room comes from Judge Cope since the Woman denies even going there. His unrebutted testimony establishes clearly that her faculty of choice was unimpaired since she requested the activity stop for fear of getting pregnant.

30. Notwithstanding, in order to justify and/or conceal its failure to investigate in the first place prior to bringing formal charges, and in order to justify the public opprobrium that was maliciously Cope brought on Judge Cope by the filing of false charges, the JQC thereafter sought to compel Judge Cope to plead to conduct alleged in Count III for which the JQC, nor any other judicial oversight body in the United States has ever asserted jurisdiction: to wit, private consensual conduct which violated neither criminal laws nor the Constitution of the State of Florida. They sought to compel a plea not only to conduct which is private and falls within the zone of protected conduct under both the Florida and federal Constitutions, they sought to compel Judge Cope to plead to aggravating circumstances concerning that conduct which were unsupported in the evidence and in fact conclusively refuted in the

evidence. This was done solely to appeal to the court of public opinion and provide after the fact justification for the public scandal the JQC had helped to precipitate through its own misconduct in failing to investigate the facts before filing the criminal charges which were never supported in the evidence.

31. On April 4, 2002, Special Counsel provided a proposed Findings and Recommendations of Discipline (Exhibit 17) which for the first time and contrary to the evidence established in the case, purported to make a finding that Judge Cope engaged in "adulterous" conduct, raised questions about Judge Cope's "moral character" and further purported to find that Judge Cope took advantage of the Woman in California due to her intoxicated state and asserted emotional vulnerability.

32. Judge Cope objected to these findings on the grounds that they were outrageously false, gratuitously inflammatory, totally unsupported in the evidence and would forever destroy his reputation.

33. On April 10, 2002, Special Counsel tendered a stipulation which, as noted above, stated in part: "**Judge Cope did not attempt to force her to have sex with him in any way, and when she said she wanted to stop, he stopped**"

34. On April 22, 2002, Judge Cope appeared before the Investigative Panel with counsel. At that time the Investigative Panel was advised of the facts established during the course of discovery, the stipulated insufficiency of the evidence in Counts II, IV, V and the majority of Count I, and the case law and facts which

established Count III should be dismissed and that no predatory conduct occurred. The Investigative Panel was also advised that the California prosecutor had advised Judge Cope's California counsel that if the JQC determined its charges could not be proven by the clear and convincing standard of proof, then California would be compelled to dismiss all of the pending criminal charges in California on the basis they could not be proven beyond a reasonable doubt.

35. Within a few days of the appearance before the Investigative Panel, MacDonald advised Kwall of its decision that Judge Cope would be required to acknowledge the objectionable predatory language in connection with Count III.

36. Thereafter further efforts were undertaken by Kwall to resolve the impasse with MacDonald. Kwall met with MacDonald and proposed a disposition to be forwarded to the JQC omitting the objectionable language in Count III. Mr. MacDonald advised Mr. Kwall that removing the predatory aspect of the charge would require Judge Cope to accept a 60 day suspension without pay as opposed to the previous demanded 45 day suspension. Remarkably, further attesting to the legitimacy of this motion, General Counsel MacDonald ultimately demanded a "price" of a greater penalty for a lesser offense.

37. Thereafter Mr. MacDonald advised Kwall that the JQC had instructed that the predatory language remain. Further the JQC instructed that if Judge Cope did not plead to such allegation, the Special Counsel would be instructed to prosecute all of the counts (including the counts which had been expressly acknowledged could not

be supported in the evidence). Further the threat was communicated to Mr. Kwall that if Judge Cope exercised his right to trial on those counts, and he was convicted, he would be removed from office.[4] On information and belief, the JQC adopted their illegal position and was and is determined to continue to prosecute unfounded charges to satisfy public opinion and avoid being perceived as too lenient.

38. Thus, General Counsel for the Investigative Panel acknowledged that Judge Cope would be expressly penalized for exercising his right to trial by a malicious prosecution on charges which the JQC had earlier acknowledged could not be supported in the evidence. Finally, when Mr. Kwall pointed out that Judge Cope did not want to publicly air the misconduct of the Woman, Mr. MacDonald acknowledged to Mr. Kwall that the evidence established that the "victim" was lying in her allegations against Judge Cope.

---

[4] Rule 19 of the Rules of the Judicial Qualifications Commission requires the vote of four members of the Hearing Panel in order to recommend removal of a judge from office. MacDonald's threat that if Judge Cope defended himself on charges, even those which admittedly were unsupported by sufficient evidence, in and of itself establishes the selective and vindictive character of this prosecution. It also disturbingly evidences a fact, which is believed discovery would establish conclusively, that judges who defend themselves on charges brought by the Investigative Panel are uniformly punished merely for the fact of defending themselves. It also disturbingly suggests that the Investigative Panel (or more likely MacDonald), perceives it can short cut the due process of the Hearing Panel by threats and intimidation intended to coerce a judge to knuckle under and abandon his or her right to a hearing. This alarming prospect, is further evidenced by the stipulation forwarded to Judge Cope's co-counsel by the Special Counsel in this case, after Special Counsel admitted he had insufficient evidence to support the criminal allegations in the formal complaint. Therein, Special Counsel asserted "Judge Cope's initial denial of all the allegations and his failure to disclose are also related to his alcohol problems in that he has suffered from denial."

This false statement, sends three messages. First, it corroborates the proposition that a judge may not deny allegations or defend against them without penalty. Second, it improperly and publicly suggests that Judge Cope was lying as a consequence of alcohol abuse when he appropriately denied the false charges brought by the JQC. Third, the false language was intended to publicly gloss over the fact that no investigation was done and no evidence existed to bring the charges in the fist place. Notwithstanding his admission that the majority of Count I and Counts II, IV and V were untrue, Special Counsel refused to delete this false language from the stipulation.

ARGUMENT

For the purpose of this argument, the events which are arguably subject to Count III may be divided into two distinct categories. The first involves the conduct on the beach between the approximate hours of 1:30 and 3:00 a.m. on April 4, 2001. At the time this charge was filed by the Investigative Panel, the Investigative Panel had conducted no investigation whatsoever into the charge other than to review the police report of Officer Nash and the fact that the California District Attorney charged Judge Cope with "battery."[5] Therein as noted Officer Nash reported the victim claimed that Judge Cope "made several forceful sexual advances, touched her breasts, kissed her and inserted his tongue in her mouth" - - all conduct supposedly occurring on the beach. The Investigative Panel totally ignored the fundamentally contradictory report the "victim" gave to the District Attorney's Office Investigator on June 15, 2001, attached hereto as Exhibit 1. Therein she totally denied any of the conduct she had falsely reported to the police on the morning of April 5, 2001. Accepting the "victim's" testimony as true as given in her deposition, that Judge Cope was gentle at all times, never deliberately touched her inappropriately or even kissed her, there is indisputably no basis on which the JQC could conclude "by clear and convincing evidence" that any intimate conduct occurred whatsoever in a public place. Special Counsel seeks to ignore this repudiation by the victim and to use Judge Cope's own truthful statements regarding the occurrence on the beach to suggest it forms a basis for conviction under the Canons of Ethics and pursuant to the allegation. However, it is undisputed that Judge Cope

---

[5] In October 2001, counsel for the Respondent reported to the Investigative Panel that Judge Cope unequivocally denied the charge and had passed a polygraph on all issues raised by the California charges. The report of that examination was provided to the Panel, together with an earnest request that the Panel investigate the matters. The Panel refused to do so.

reported only that the two mutually kissed on the beach. Further the beach was deserted. Further Judge Cope testified that the woman was not "very intoxicated" at the time (as did she) and that at the point when the kissing occurred she was in fact a happy, willing participant in that very limited activity. Accordingly, there is no basis from which the JQC could find that the conduct admitted by Judge Cope on the beach was either a) intimate to a sanctionable degree, b) in a public place (i.e., witnessed by anyone), or c) in any manner or form nonconsensual on the part of the Woman.

The second category of intimate conduct which the JQC now argues falls under the umbrella of Count III, is that limited intimate conduct which took place in the privacy of Judge Cope's hotel room. Here again the evidence establishes the Woman's denial that the conduct even occurred. To the extent she admits to any physical interaction at all with Judge Cope, it consisted solely of earlier "gentle" attempts to kiss her which she rejected. Judge Cope's testimony, which is the only testimony that the JQC has upon which conclusions can be based with respect to the conduct in the hotel room, is uncontradicted and stipulated as true. His testimony is and will be that the woman, as she herself admitted, was essentially sobering up, that she was in full control of her faculties, and that he did not take any advantage of her. Such is clearly and convincingly established by both the Woman's own admissions and the fact that after a brief period of light petting the Woman exercised her free will when she decided to terminate the consensual activity for fear of getting pregnant again; a decision to which Judge Cope acquiesced.

Thus, assuming jurisdiction of the JQC over such conduct in the privacy of a hotel room, the only evidence of the conduct is Judge Cope's testimony which clearly establishes her conduct was

consensual. Judge Cope's testimony is amply corroborated by independent investigation conducted at great expense by Judge Cope. The results of which are elsewhere set out in this motion.

Significantly, the Woman admitted in deposition that Judge Cope never took advantage of her. The evidence also clearly shows that this woman was a mature 32 year old with a history of casual sexual activity and drinking, who made a direct and unvarnished pitch for Judge Cope's company, including his physical affection. At the time of her visit to Carmel this woman was having or recently had adulterous relationships, with not one but two married men.

Moreover, her recorded statement to the District Attorney's Investigator further conclusively belie the proposition that she was either "obviously intoxicated" or "emotionally vulnerable."

In describing what occurred on the beach before they even got to the hotel room the Woman stated:

> I realized okay I need to get out of here. I need to get away from this guy. But I was really nervous because the sand was really deep and I didn't know how well I could get away from this guy running in the sand. And, but when I got up to the parking lot, I felt much more confident that I could get away from him. . . He was very touchy you know, like when we walked from the driftwood up to the parking lot, he had his arm around me and I just kept walking and he was walking with me. And I didn't want to make a big deal and then when we got up to the parking lot, he again tried . . I guess you could say embrace me. - - He was wearing like a white jacket - - I pushed him pretty good. And I turned and took off. I remember stumbling. I almost fell down but I didn't. . . . It's pretty clear still and I remember every time . . I would stop, I would look back and he wasn't after - - I never saw him again.

The above statements clearly evidence not only a sophisticated and clear thought process (albeit dishonest); they further evidence a determination not to be taken advantage of, and mental and

physical faculties inconsistent with being "very intoxicated." These mental and physical faculties are reflected in further unambiguous statements that she made.

> "I mean I really felt like he had ulterior motives. And I mentioned it then (to her Mother) and we went to bed . . . At some point when we were on the beach . . he said you know, 'go to dinner with me tomorrow night' and I said, 'no I'm here with my mom' and he said that like twice - - more than definitely more than once . . and I was like, where is this . . what does this have to do with anything . . at that point I was coming to, going wait a second, I don't think this guy is a sincere guy . ."

To be sure each of the above statements is false; but they demonstrate conclusive admissions that she was possessed of the faculties that Count III asserts she did not possess. Indeed Judge Cope's report of what occurred in the hotel room and before they got to the hotel room is equally consistent with her possession of these faculties. (Cope Depo p. 327) Accordingly, there is no evidentiary basis to support the scurrilous assertion that Judge Cope either did or attempted to take advantage of the Woman's alleged "extreme intoxication" and supposed "emotionally vulnerable state." Such contention is also further refuted by the fact that when the Woman voluntarily decided to terminate the intimate contact for fear of another pregnancy, the two stopped their conduct.

Apart from the fact that the charge has been disproven, is the fact that the conduct in the hotel room and the undisputed private and entirely legal character of that conduct, clearly places the conduct beyond the jurisdiction of the Judicial Qualifications Commission, and beyond the contemplated prohibitions of the Judicial Canons of Ethics. Such conduct is fundamentally protected by the privacy guarantees of both the federal and state constitutions, did not constitute criminal activity of any sort, and did not remotely approach sexual intercourse.

Special Counsel has acknowledged that a judge's sex life or conduct behind closed doors is ordinarily beyond the scope of the Code of Judicial Conduct or the legitimate concern of the Florida Judicial Qualifications Commission. No known reported case in the United States warrants the conclusion that the Code of Judicial Conduct can reach into such a hallowed realm of privacy in the circumstances that pertain here.

Indeed the cases in Florida and elsewhere draw a bright line between consensual, private sexual conduct of a judge and those situations where a judge is properly sanctioned for public conduct which brings approbation upon the judiciary. *See*, for example, *In Re: Lee*, 336 So.2d 1175, 1176 (Fla. 1976), where the court properly found that the judge engaged in conduct unbecoming a member of the judiciary where he "engaged in sexual activities with a member of the opposite sex not his wife in a parked automobile." In *Lee* the gravamen of the offense was the specific finding that the judge "openly engaged in sexual acts while in an automobile parked at a public parking lot in Ft. Lauderdale, Florida" (emphasis added). Such flagrant public conduct caused the commission to conclude that Judge Lee had "rendered himself an object of disrespect and derision in his role as a judge, has caused public confidence in the judiciary to become eroded [and] is guilty of violating Canons 1 and 2 of the Code of Judicial Conduct." Review of cases elsewhere confirms the clear demarcation between a judge's entirely private conduct and that which by its flagrantly public character brings the judicial office into disrepute.

In the case of *In Re: Fournier*, 480 SE.2d 738 (SC 1997) a municipal judge was sanctioned for engaging in regularly conducted sexual activity in his car in his business parking lot, which activity was observed and complained of by the manager of a retail business and which was also observed by

police. The respondent there was arrested and criminally charged with indecent exposure. Thus, the case directly implicated both criminal conduct and openly public conduct.

In the case of *In Re: Snyder*, 336 NW.2d 533 (Minn. 1983), a judge was censured for repeatedly engaging in sexual intercourse with another man's wife over the course of one and half years, continuing five months after he had notice of the investigation into those activities. Moreover, the conduct constituted adultery, a gross misdemeanor under Minnesota statutes. The judge was charged with conspiring with his lover to deceive her husband in preparing a false notice of a legal secretarial course to conceal their illicit rendezvous at a judge's meeting. Furthermore, the judge admitted to being the father of his lover's child, attended her baptism which public conduct became the subject of gossip and speculation in the community tending to bring the judicial office into disrepute. Moreover, the judge there signed orders to show cause against his lover's husband in a dissolution action. Clearly, this case establishes that there must be a basis whereby the conduct complained of "brings the judicial office into disrepute" because of the flagrant nature of the conduct, the violation of a criminal statute, and/or the establishment of some nexus with the judicial office.

Similarly, in *Cincinnati Bar Association v Heitzler*, 291 NE.2d 477 (Ohio 1972), the judge was charged with three counts of sexual misconduct, two of which were dismissed. The allegation sustained was that the judge lived with another woman not his wife and that she was frequently at his apartment and the conduct gave the impression to others that they were living together. This count was sustained because the respondent's personal behavior "gave the appearance of impropriety and was not beyond reproach."

All of the foregoing cases share in common the requisite jurisdictional aspect of public behavior. Indeed Canon 2a states:

> "A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. (emphasis added)
>
> The prohibition against behaving with impropriety or the appearance of impropriety apply both to the professional and personal conduct of a judge."

Clearly, this commentary makes clear that the language of the Canon is addressed to the "personal conduct" of a judge only insofar as that "personal conduct" is public and would be the subject of "public scrutiny." The Canon clearly addresses only that judicial misconduct arising with the administration of judicial duties or personal misconduct which while not directly affiliated with judicial function, occurs in a public place or in some public manner such as to bring approbation upon the judiciary as a whole. The Canon does not and cannot purport to in any way sanction private conduct by a judge which is clearly protected by the privacy guarantees of both the federal and state constitutions and is not criminal.

This Court's attention is directed to the case "*In the Matter of Arthur Dallasandro, Judge of Court of Common Pleas of Lucerne County* before the Supreme Court of Pennsylvania, 483 PA 431, 397 A.2d 743 (PA 1979). There the judge was charged with numerous violations unrelated to sexual misconduct. However, one charge alleged that the judge maintained an improper intimate relationship over the course of 4 ½ years while he was a judge. Further that this relationship which involved sexual activity continued after the judge's girlfriend became married. Further the judge himself was married to another woman. In a well reasoned opinion which controls the disposition in this case

on the facts here, the court held that both the Constitution of the State of Pennsylvania and the Judicial Canons do not permit sanctions for the type of conduct in that case (and therefore certainly not with the type of conduct here). As the court stated:

> "To read into the Constitution or the canons prohibitions which go beyond the above categories is to enter a most precarious area of inquiry for the state, the realm in which private moral beliefs are enforced and private notions of acceptable social conduct are treated as law. Standards in these private areas are constantly evolving, and escape, at any given moment, precise definition. Conduct of a judge or any public official which may be offensive to the personal sensitivities of a segment of the society is properly judged in the privacy of the ballot box. - - This tribunal can only be concerned with conduct which as previously noted involves a judge acting in his official capacity or conduct which affects the judge acting in an official capacity or conduct prohibited by law. - - The imposition of any discipline based on conduct unrelated to a judge's official conduct which is not prohibited by the public policy of this commonwealth as manifested in its laws would raise serious due process issues - - The conduct of the respondent involving his relationship with Judith Walton is not a violation of the law. - - Since the respondent's conduct was not prohibited by law there is no basis for discipline regardless of the private views of this Court."

Here of course the very limited intimate conduct did not remotely approach sexual intercourse, it was conducted entirely in private, no criminal laws were violated, and no adultery was committed. Simply put, it is none of the business of the JQC to sanction Judge Cope for this conduct. Were such a standard to apply, the mischief that would result and damage to the judiciary would be incalculable. Judges would routinely be subject to blackmail were they to engage in the most minor indiscretion in a private setting; even if they were merely falsely charged with such a minor indiscretion.

The principal of *Dallasandro* was affirmed in a recent case, *In the Matter of the Disciplinary Proceedings Against Honorable Ralph G. Turco* before the Supreme Court of Washington, *en banc*, 137 W.2d 227 970 p.2d 731 (Wash. 1999).

There the Respondent judge allegedly pushed his wife to the ground at a public affair. The judge argued in defense that his conduct was extra judicial conduct and therefore not appropriately the subject of discipline. He cited an aspect of the *Dallasandro* case which is not pertinent to the issue here (wherein the judge in the *Dallasandro* case was also accused of slapping his wife). Judge Turco asserted that the *Dallasandro* decision stands for the proposition that if he beats his wife in some place other than open court in a manner that does not result in a criminal conviction such conduct does not violate the Code of Judicial Conduct.

After a thorough discussion of precedent involving the proper reach of supervisory bodies to investigate and sanction judicial misconduct implicating conduct away from the bench and the appropriate reach of the Judicial Canons which require the highest standard of personal behavior in judges, the Supreme Court in *Turco* stated the following:

> In addressing extra judicial behavior of judges, our authority to discipline, and that of the Commission are not unlimited. We believe that authority is confined to those situations for which there is an articulatable nexus between the extra judicial conduct and the judge's duties. While certainly there is some extra judicial conduct that is reprehensible, not all such conduct reflects adversely on the judiciary or a particular judge's ability to decide cases fairly in a way that implicates our supervisory powers. All judges in Washington are either elected or appointed by elected officials, and are thus subject to popular opprobrium and election redress for conduct the public considers inappropriate, reprehensible or unseemingly for those who would be a judge among them. (emphasis added)

Turco, 970 P.2d at 740.

The court concluded that the evidence established clearly and convincingly that Judge Turco intentionally pushed his wife to the ground at a public function. The court specifically found a nexus between that public conduct and Judge Turco's judicial duties by virtue of the fact that he was engaging in an act of domestic violence and victims of domestic violence appearing before him in court would be justified in questioning whether a judge who allowed himself to assault his own wife could rule impartially and wisely in the emotionally charged arena of domestic violence.

No such nexus exists in this case.

In another case involving allegation of sexual misconduct, *In Re: Hasay*, 666 A.2d 795 (Penn. 1995), the judge was charged with going to a bar and drinking beer, dancing and singing with other individuals including an adult female, with whom he left the bar and drove to his house where the two engaged in sexual activities including intercourse without her consent. The charges were brought against the judge by the Pennsylvania Judicial Conduct Board after criminal charges were filed against the judge alleging rape.[6] Notwithstanding the filing of the criminal charges, for which the judge was acquitted, it was determined that the facts established that the adult female voluntarily entered the respondent's car at the bar, remained in the respondent's vehicle while he himself left the vehicle, entered the respondent's home and talked for some time and thereafter consensually engaged in oral and vaginal intercourse. It was further found that the respondent made no physical or verbal threats against the adult female. The respondent was acquitted of all criminal charges. However the issue remained as to whether the respondent's conduct violated the Canons of Ethics. In an opinion that

---

[6] In this proceeding, the JQC filed its allegation in Count III against Judge Cope without conducting any investigation based on and in response to the criminal charge of "battery" previously filed in California.

again confirms that the private, consensual, and constitutionally protected conduct of a judge is appropriately beyond the reach of sanction or discipline, the Supreme Court of Pennsylvania stated:

> "With respect to [the charge] we conclude that the intimate sexual activities between respondent and the adult female where consensual, and that the board has not supported its allegations by clear and convincing evidence. Therefore we conclude that the activities of the night of January 6-7, 1991, do not warrant the discipline for violation of the rules governing standards of conduct for district justices, the Pennsylvania constitution, or the crimes code. (*Hasey* at 799) (Johnson, J. dissenting)

The Florida Supreme Court's decision in *In Re Norris*, 581 So.2d 578 (Fla. 1991), further evidences that private, consensual sexual conduct by two adults is not within the purview of the JQC's investigative jurisdiction and that Judge Cope is being selectively and vindictively prosecuted under Count III. In that case, there was unrefuted evidence that the respondent had engaged in a homosexual act and that a photograph had been taken of such act. When the photograph surfaced, the respondent (an admitted alcoholic) went on a three day drinking binge endangering the public and others by, *inter alia*, driving while intoxicated and discharging a firearm into a sofa. In addition, the respondent attempted suicide through carbon monoxide poisoning. The respondent, who at the time was represented by the General Counsel in this action, Thomas MacDonald, received only a reprimand for the acts that occurred during the life threatening three day drinking binge. The Court's decision in that case evidences that there was no effort by the JQC to investigate the homosexuality of the respondent or to discipline him for such deviant sexual conduct.

Notwithstanding, Special Counsel for the JQC may contend that no barriers exist preventing the JQC from investigating a judge's private conduct, citing dicta in the case of *In Re: Frank*, 753 So.2d 1228 (Fla. 2000), wherein the court stated "a judge is a judge 7 days a week, 24 hours a day

and must act accordingly" (*Frank* at 1233). The application of such dicta, taken out of context, patently misconstrues its meaning as intended and utilized by the court in *Frank*. *Frank* dealt with allegations relating to the judge's active and public involvement in matters surrounding his daughter's divorce. In a four count complaint, the JQC alleged that Judge Frank made false or misleading statements to a newspaper reporter and under oath during a hearing before a grievance committee of the bar; failed to disclose to opposing counsel or recuse himself from appellate cases in which his daughter's attorney appeared; improperly interfered with the bar grievance proceeding by exerting his position as a judge in a manner unbecoming his office; and that during the divorce proceedings involving his daughter Judge Frank telephoned the husband's father and threatened to use his authority as a judge to have his son arrested or committed to a psychiatric facility.

The comment by the court that "a judge is a judge 7 days a week, 24 hours a day and must act accordingly" was specifically directed to Judge Frank's guilt on Counts I and II; and more particularly directed to the observation by the court that Judge Frank was "emotionally involved and interested in his daughter's divorce case and became extremely adverse to Mr. Straley," an occurrence the court found was "certainly not an uncommon occurrence in hotly contested dissolution litigation." The court offered the mitigating observation that Judge Frank's conduct "as a parent is well understood," which it then qualified with the remark concerning the judge's status as a judge 7 days a week and 24 hours a day.

In short, the cited language was clearly intended, and only intended, to demark Judge Frank's status as a judge first and foremost over and above his status as an aggrieved and emotionally involved parent. Nothing in the opinion or the language suggests that otherwise purely private personal moral

lapses or errors in judgment are properly within the reach of JQC scrutiny. The *Frank* case dealt with notoriously public matters. Indeed the court further emphasized the necessary predicate for discipline in the first instance, being the public aspect of the conduct and the appearance of impropriety thus created:

> "Judges must do all that is reasonably necessary to minimize the appearance of impropriety. They must remain cognizant of the fact that even in situations where they personally believe that their judgment would not be colored, public perception may differ." (Emphasis added)

Frank at 1240.

Finally, the court reiterated the dicta in its "conclusion" in a manner which clearly places the language in a context other than that which Special Counsel might suggest:

> "We understand that it would be beyond logic to suggest that judges must remain detached from matters important to them and their families. However, the JQC is correct in noting that a 'judge is a judge 7 days week, 24 hours a day'. While judges are human and also have parents, siblings and spouses, these relationships cannot be used to excuse the abuses which occurred here. We must not forget that those entrusted with the authority to carry out justice have the burden to not fail that awesome responsibility; fulfillment of that responsibility encompasses, *inter alia*, being entirely forthcoming in all judicial or quasi judicial proceedings irrespective of whether one appears as a witness, a party, or a judge."

JUDGE COPE IS BEING PROSECUTED ON THIS CHARGE SELECTIVELY AND VINDICTIVELY

As noted, no reported case in the United States to counsel's knowledge sanctions a judge for private, consensual, intimate conduct, however indiscrete, which violates neither criminal law nor the

Constitution.[7] Judge Cope is similarly situated with every other jurist in the United States (and in Florida) who engage in such conduct, whether married or unmarried, without fear of prosecution by the JQC. It may be presumed that many judges sit on the benches of this state with varied sexual preferences, practices and lifestyles. The prosecution of Judge Cope on the circumstances here announces to the world an impermissible raising of the bar of judicial oversight whereby authority is vested in the JQC and similar bodies throughout the United States to act as "sin sentinels" and launch inquisitions into judges' private choices. The zeal of Special Counsel in impermissibly attempting to break through Judge Cope's hotel room door at 3:00 a.m. in the morning and observe and condemn Judge Cope for consensual conduct in his private room is appalling. That zeal is evidenced by a significant question posed by Special Counsel during Judge Cope's deposition:

> Q: Okay. Other than Lisa Jeanes, were there any other women that you met that you wanted to have sex with there in California? (Deposition of Judge Cope, Vol. 3, 3/7/02, page 533, line 1)

Such a question is reminiscent of the inquisition and clearly evidences the selective and vindictive approach to this case by the JQC Special Counsel. Such questioning is repugnant to precepts of ordered liberty and due process and improperly transgresses the line between permissible and impermissible inquiry concerning the conduct of a judge.

The selective and vindictive nature of this prosecution is most clearly established by the facts that not only has no case in Florida ever crossed this line, but the most recent considered by the JQC on even more egregious facts refused to cross the line that the JQC now wants to cross.

---

[7] To be sure, the private, consensual conduct of Judge Cope and the Woman is now in the public domain. This fact, however, was directly occasioned by the filing of Count III by the JQC without investigation and without probable cause, necessitating the airing of the conduct in defense of the charges.

This Court's attention is directed to the *Inquiry Concerning a Judge, Honorable Robert H. Bonanno* captioned "FJQC Hearing Panel Supplemental Report and Recommendation" dated November 20, 2001 and filed with the Supreme Court. Therein the JQC specifically addressed the allegation that Judge Bonanno had violated Judicial canons by carrying on a multi-year affair with a court clerk. In recommending a mere reprimand for Judge Bonanno for public conduct the Honorable James R. Wolf, Chairman of the Florida JQC, stated:

> "The evidence of Judge Bonanno's affair with a court clerk is, in fact, 'incontrovertible'." Based on that time in his chambers alone, traveled out of town together, and she once went with him to a judicial conference. However this evidence reflects a private consensual affair, and no 'improprieties' committed on court time or with court funds. There is no evidence that the two were ever intimate on court premises, that Judge Bonanno asserted any undue pressure on Joan Helms, that he used his position to further his private relationship, used public funds to support it, or that he lied about it. While an extramarital affair reflects poorly on Judge Bonanno, it does not constitute a removable offense, and warrants the same type of discipline the commission has already recommended. See, *In re: Flanagan*, 240 Connecticut. 157, 690 Atlantic 2nd 865 (Conn. 1997) (judges three year consensual affair with a married court reporter assigned to his courtroom was conduct prohibited by canons 1 and 2a because it could lead a knowledgeable observer to question judicial integrity, and warranted public reprimand)."

Moreover, Judge Wolf cited the Grand Jury's report in acknowledging that "a judge's private life is not public property," but that "improprieties committed on public time and public property are properly subject to public scrutiny."

Here, none of the aggravating factors cited in Judge Wolf's report in the *Bonanno* matter, which according to Judge Wolf warranted a mere reprimand appear in the evidence. The "intimate" conduct between Judge Cope and the Woman spanned a matter of minutes at most, as opposed to

years in the *Bonanno* case. The conduct involved merely kissing and petting and did not involve sexual intercourse as it did in the *Bonanno* case. The conduct was entirely private. The two never spent any time in Judge Cope's chambers or on judicial property. The two never traveled together to attend a judicial conference, as *Bonanno* and his paramour did. There is no evidence whatsoever that Judge Cope asserted any undue pressure on her or that he used his position as a judge to further his brief relationship with her or that he used public funds to support it, or that he lied about it. Indeed it was Judge Cope's truthfulness that brought the brief intimate encounter to the JQC's attention. Moreover, none of the circumstances warranting a public reprimand in the *Flanagan* decision cited by Judge Wolf, obtained in this case.

While Judge Wolf is not entirely clear, his recommendation seems to suggest that Judge Bonanno's conduct warranted a reprimand. The case he cites in support of that proposition (*Flanagan*) does not support a reprimand or even jurisdiction on the facts here, and certainly is a much more egregious situation which establishes a concrete "nexus" between the judicial function and the questioned behavior (consensual affair with a married court reporter assigned to the judge's own courtroom). It does not appear from Judge Wolf's report that a separate reprimand was issued to Judge Bonanno on the consensual affair. If Judge Wolf intended that the previous reprimand would be supplemented by another reprimand for the affair, it may be only inferred that the basis for such was the fact that *Bonanno* implicated a notoriously rumored multi-year affair carried out in public which involved not only private time together in chambers but involved as well travel to a judicial conference and rumor and scandal in the courthouse. None of these considerations remotely obtain in this case.

General Counsel, Thomas MacDonald himself admitted the selective and vindictive nature of the prosecution on this count by commenting on the clear disparity between the treatment of Judge Bonanno and the proposed treatment of Judge Cope that "times have changed."

Moreover, there is no evidence whatsoever that the brief conduct of Judge Cope in the privacy of his hotel room was committed "on court time or with court funds."

Judge Cope incorporates by reference the legal authorities pertinent to the issues of selective and vindictive prosecution set forth in his companion motion to dismiss.

Finally, the record evidence establishes clearly that the allegations in Count III, paragraph 13, pertaining to the Woman's level of intoxication and supposed emotional vulnerability cannot be sustained. The very fact that Special Counsel and General Counsel are attempting to coerce a plea to such unsubstantiated allegations is further evidence of the selective and vindictive nature of this prosecution. It is significant that coupled with the attempted coercion to this contrived scenario, Tom MacDonald was insisting upon a suspension without pay for 45 days. Thereafter, when Judge Cope advised that he could not truthfully stipulate to the false assertion that he took advantage of the woman's vulnerable and/or diminished mental state, the General Counsel ultimately agreed to propose removing the offending language to the JQC. General Counsel MacDonald in the same conversation also asserted that removing the predatory language would require Judge Cope to accept a 60 day suspension without pay as opposed to the previously demanded 45 day suspension. Such irrational demand for a price of a greater penalty for a lesser offense further evidences that the prosecution of Judge Cope is selective and vindictive and is not driven by any factual basis relating to misconduct. Furthermore, given the inconsistent treatment of Judge Bonanno, who broke into a fellow judge's

office, who reportedly gave evasive and inconsistent testimony under oath to a grand jury, and who indisputably carried on a years long affair with a courthouse employee, which was a matter of public notoriety, it is clear that Judge Cope is being singled out and prosecuted under Count III for conduct which is not within the legitimate investigative powers of the JQC for purposes wholly unrelated to judicial misconduct.

In short, not only is dismissal of Count III mandated under the legal precedents of this court and other jurisdictions, such dismissal is also mandated by the Special Counsel's own admissions that the JQC has no business going behind the bedroom doors of judges. Notwithstanding, Judge Cope still offered to plead guilty to those aspects of Count III that were true and which were brought forward by his own volition. Special Counsel however, contrary to the great weight of the evidence and prior precedents of the JQC, at the instruction of General Counsel MacDonald and the JQC, insisted that Judge Cope plead to the false predatory aspect of that charge. It is reasonable to conclude that such demand was made in an effort to justify the draconian penalty of a 45 day suspension and in turn justify, excuse and conceal the misconduct of the Investigative Panel in bringing such charges in the first instance without any reasonable investigation.

WHEREFORE, Judge Cope respectfully requests that the JQC dismiss Count III given that such count violates the legal precedents of the Florida Supreme Court, the JQC as well as other jurisdictions and because such is the product of selective and vindictive prosecution.

Respectfully submitted,

ROBERT W. MERKLE, ESQ.
Florida Bar Number: 138183
MERKLE & MAGRI, P.A.
5510 West LaSalle Street
Tampa, Florida 33607
Telephone: (813) 281-9000
Facsimile: (813) 281-2223

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express to: **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32302; **John S. Mills, Esq.**, Special Counsel, Foley & Laudner, 200 Laura Street, Jacksonville, Florida 32201-0240; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602, **Louis Kwall, Esq.**, Co-Counsel for Respondent, 133 North Ft. Harrison Avenue, Clearwater, Florida 33755; this _____ day of May , 2002.

ROBERT W. MERKLE, ESQ.